IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

MILHELM ATTEA & BROS., INC.,
Respondent.

v.

ELIAS H. ATTEA, JR.,
6175 Stickler Street, Clarence, New York 14031,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF *AMICI CURIAE* OF SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

BRADLEY S. WATERMAN
(Counsel of Record)
SAMUEL M. MAZZOLA
G. FRANK RUBY III
Of Counsel
[illegible]
601 13th Street, N.W., Suite 900S
Washington, D.C. 20005
(202) [illegible]
Counsel for Amici Curiae
Saint Regis Mohawk Tribe
Mohawk Tax Steering Committee

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE NEW YORK STATE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS' REGULATORY SCHEME IS PRE-EMPTED BY FEDERAL LAW	5
A. Federal Law Pre-Empts State Regulations that Conflict or Interfere with Federal Law Applicable to Transactions between Indians and Federally Licensed Indian Traders	5
B. New York's Regulatory Scheme Violates Federal Law by Interfering with Commerce between Indians and Federally Licensed Indian Traders	10
1. New York's Tax Scheme Comprehensively Regulates Sales by Indian Traders on Indian Territory	10
2. New York's Tax Regime Conflicts with Federal Law and Usurps Tribal Self-Government	13
II. THIS COURT'S DECISIONS IN *MOE*, *COLVILLE*, AND *POTAWATOMI* ARE INAPPOSITE	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) 7, 8
City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n, 898 F.2d 122 (10th Cir. 1990) 22
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 9
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 5, 9
Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 20, 21
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 22
Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) 9
Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) ..... *passim*
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 16, 20, 21
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 8, cl. 3 5

UNITED STATES TREATIES

Treaty with the Six Nations art. III, 7 Stat. 15 (1784) 10

UNITED STATES STATUTES

25 U.S.C. § 261 ..... 6, 13, 15, 19
25 U.S.C. §§ 261-264 ..... 6, 21
Act of July 22, 1790, ch. 33, 1 Stat. 137 6

UNITED STATES REGULATIONS

25 C.F.R. §§ 140.1-.26 6

NEW YORK STATUTES

Tax Laws § 471 10
Tax Law § 476 17

TABLE OF AUTHORITIES—Continued

NEW YORK STATE REGULATIONS — Page

20 NYCRR § 335.6(b) 11, 13
20 NYCRR § 335.6(d) 11, 15
20 NYCRR § 335.6(e) 11, 15, 16
20 NYCRR § 335.6(f) 11, 15
20 NYCRR § 335.6(g) 14, 16
20 NYCRR § 335.7(b) 11
20 NYCRR § 335.7(c) 11, 12, 14
20 NYCRR § 335.7(d) 11, 12, 14, 15, 17

MISCELLANEOUS

Cigarette Smoking Among American Indians, Alaskan Natives—Behavioral Risk Factor Surveillance System, 1987-1991, 286 J. of Am. Med. Ass'n 3052 (Dec. 2, 1992) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

MILHELM ATTEA & BROS., INC.,
Respondent.

v.

ELIAS H. ATTEA, JR.,
6175 Stickler Street, Clarence, New York 14031,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF *AMICI CURIAE* OF SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

The Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee submit this brief as *Amici Curiae* in support of respondents Milhelm Attea & Bros., Inc. and Elias Attea, Jr.[1] The Iroquois Business Association also joins this brief.

[1] This brief is filed with the permission of the parties. Written consents have been provided to the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The Saint Regis Mohawk Tribe (the "Tribe") is a federally recognized, sovereign Indian nation. Its lands straddle the border between the United States and Canada. The Tribe is one of the six nations (the "Six Nations") that collectively constitute the Iroquois Confederacy.

The Mohawk Tax Steering Committee (the "Steering Committee") was formed during 1992 under the auspices of the Saint Regis Mohawk Tribal Council, an elected governing body of the Tribe. It consists of representatives of the Council, traditional Mohawk people (*i.e.*, those who follow the "Longhouse" form of government), the Mohawk business community, and other groups.

The function of the Steering Committee is to represent the Mohawk people, collectively, and to provide representation on behalf of individual Mohawks, before the Internal Revenue Service, the U.S. Department of the Treasury, federal and state courts, the U.S. Congress, the State of New York and its Department of Taxation and Finance, and the New York legislature in cases involving alleged infringement on sovereignty by reason of taxation, and in general, alleged illegal taxation of Mohawks.

The State of New York imposes tax on the possession of cigarettes for sale. The case before this Court involves an attempt by the State, through regulations promulgated by its Department of Taxation and Finance, to require respondents, both of whom are wholesalers, to precollect this tax on sales of cigarettes to Indian retailers in Indian territories.

Respondents engage in trade with Indian retailers pursuant to federal Indian trader licenses issued by the Bureau of Indian Affairs of the U.S. Department of the Interior. They contend that only the federal government may regulate commerce between federally licensed Indian traders and their Indian customers, and, accordingly, that the regulations are invalid, as the New York Court of Appeals ruled below.

The Tribe and the Steering Committee have a significant and direct interest in this case for three reasons. First, the case involves the attempted state regulation of transactions involving Indian retailers and occurring within the boundaries of Indian territory.[2] Second, the regulatory regime envisions direct participation by the Tribe and other Indian nations with territory that borders New York. Third, the regulatory regime will result in extraordinary burdens on Indian retailers and/or impermissible taxation of consumers who are not subject to New York's cigarette tax.

In summary, this case involves the imposition of significant burdens on commerce within Indian territory between non-Indian suppliers and Indian retailers. Respondents' interests stem from their status as federal licensees. The Tribe and the Steering Committee concur with respondents' position. In addition, however, the Tribe and the Steering Committee respectfully contend that analysis of this case also requires consideration by this Court of the unique and federally recognized interests of the Iroquois nations and their people.

SUMMARY OF ARGUMENT

The State of New York Court of Appeals correctly held that federal regulation of commerce between licensed Indian traders and Indian retailers pre-empts New York's regulatory scheme for precollection of taxes on cigarettes that may be sold to non-Indian customers in Indian territory.

The analytical framework set forth by this Court requires examination of the broad policy underlying the federal Indian trader laws and notions of Indian sovereignty rooted in traditional tribal independence. In light

---

[2] For many Iroquois, the term "reservation" has negative racial, ethnic, and cultural connotations. This brief refers to areas that are within the governmental jurisdiction of the Six Nations as "territories," rather than "reservations."

of the federal, tribal, and state interests at stake, enforcement of New York's cigarette tax regulations would interfere with virtually every aspect of commerce between Indian traders and Indian merchants on Indian land, thereby violating federal law.

The regulations in controversy would invest New York's Department of Taxation and Finance with unfettered control over both the number of untaxed cigarettes available to be sold by Indian traders and the persons permitted to purchase and resell such cigarettes. Exercise of such control would conflict directly with section 261, title 25 of the U.S. Code, and would usurp proper Indian sovereignty over commerce in Indian territory. The regulations would impose onerous and expensive paperwork and recordkeeping requirements on all federally licensed Indian traders, Indian retailers, and individual Indian consumers in their dealings on Indian land. In addition to burdening commerce between licensed Indian traders and their Indian customers, the State's licensing procedure also would undermine tribal sovereignty. Finally, it is likely that New York's regulations would allow for insufficient supplies of untaxed cigarettes for sale to Indian consumers on Indian territory. That would burden the licensed traders, Indian retailers and wholesalers, and, most clearly, individual Indians.

The pre-emptive effect of the federal Indian trader laws with respect to commerce between the traders and their Indian customers is not limited by this Court's holdings in cases involving the duties of Indian merchants to collect sales taxes on sales to non-Indian customers on Indian territory. Those cases did not consider the impact of federal Indian trader laws.

ARGUMENT

I. THE NEW YORK STATE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS' REGULATORY SCHEME IS PRE-EMPTED BY FEDERAL LAW.

The New York State Court of Appeals held that the tax provisions in question, although designed to ensure the collection of tax from non-Indian consumers, encroached to a significant degree on trade between wholesale distributors and their Indian customers, and thus were pre-empted by federal law. The holding of the Court of Appeals was correct, and should be affirmed.

A. Federal Law Pre-Empts State Regulations that Conflict or Interfere with Federal Law Applicable to Transactions Between Indians and Federally Licensed Indian Traders.

Rulings issued by this Court, beginning with *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965) ("*Warren Trading Post*"), and including the more recent decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*White Mountain*"), establish strict limits on state regulation of commercial relations with the Indian nations. New York State's cigarette tax regulations must be evaluated in light of these precedents and their historical antecedents.

Federal control of commercial and other relations with the Indian nations is rooted deep in our history. In part, these matters have been treated as a federal responsibility because of the unique status of the Indian nations as independent peoples. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-69 (1973). Underpinning the federal role is the Indian Commerce Clause of the United States Constitution, which grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The federal government has exercised its special authority to regulate dealings with the Indian nations from the outset of the Republic. In 1790, the first Congress of the United States passed a statute "to regulate trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, 1 Stat. 137. From that day forward, federal statutes have governed commerce with the Indians in their own territory. These federal statutes are codified in their current form at title 25 of the U.S. Code, sections 261 through 264, and are referred to collectively as the "Indian trader laws." The essential operative provision grants the Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes" and to make rules "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[3] A comprehensive scheme of federal regulations implements the statutes. *See, e.g.*, 25 C.F.R. §§ 140.1-.26.

The Indian trader laws are one component of the wide range of federal policies, procedures, statutes, and regulations governing virtually every aspect of dealings between Indians, in their own territories, and outside interests. A panoply of federal law has been enacted to protect and enhance the ability of Native American nations and individuals to earn a livelihood, taking into account Indian sovereignty and right to self-government on Indian land.

Pre-emption doctrine, as developed by this Court, recognizes the special nature of the relationship between the

[3] This Court has noted that the Indian trader laws constitute a "statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Warren Trading Post*, 380 U.S. at 691. As *Warren Trading Post* itself makes clear, however, the pre-emptive effect of a federal regulatory scheme applicable to Indians is not restricted by the original congressional intent for the statutes involved.

Indian nations and the United States.[4] In *Warren Trading Post*, this Court unanimously concluded that the "apparently all-inclusive" federal Indian trader laws "seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders." 380 U.S. at 690. *Warren Trading Post* involved Arizona's attempt to impose a tax of two percent on the gross receipts of a retailer whose business was located in Navajo territory and who was a federally licensed Indian trader. The Court explained that:

> [A]ssessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress . . . . This state tax . . . would put financial burdens on appellant [the federally licensed Indian trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed . . . .

380 U.S. at 691. The Court concluded that Arizona's laws imposing tax on a federally licensed Indian trader's sales to Navajos on Navajo territory were pre-empted by federal law.

Subsequently, this Court held that the Indian trader laws also pre-empt imposition of Arizona's gross receipts tax on a one-time sale of farm equipment to an enterprise owned by the Gila River Indian Tribe and operating on Gila River territory, even though the non-Indian supplier was not a federally licensed trader. *Central Machinery*

[4] In contexts other than this one, the scope of federal pre-emption depends upon whether Congress explicitly stated its intention to pre-empt state regulation. It is well settled, however, that "state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." *White Mountain*, 448 U.S. at 151.

Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980). Determining that the transaction in question "falls squarely within the language of 25 U.S.C. § 264," the Court concluded that "[i]t is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165.

In a number of subsequent cases, the Court has had occasion to explicate in greater detail the *Warren Trading Post* analysis, as applied in the context of other federal statutes. These cases establish a more articulated framework for analyzing the pre-emptive effect of federal law on state regulation of commercial relations with the Indian nations.

In *White Mountain*, the Court reviewed the factors to be considered in cases where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. 448 U.S. at 144. At issue in that case was whether federal statutes and regulations vesting the Bureau of Indian Affairs with broad authority over the sale of timber on Indian territory, including the power to designate prices and yields, pre-empted motor carrier license and fuel taxes sought to be imposed by the State of Arizona. The litigant in question, a logging company engaged by the tribal timber enterprise to cut and transport trees, operated solely on roads located on Indian lands. In holding that Arizona's tax regime was pre-empted by federal law, the Court stated that it is necessary to examine

> the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for *a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in*

> *the specific context, the exercise of state authority would violate federal law.*

448 U.S. at 144-45 (emphasis added). The Court concluded that the state's interest in raising revenue could not overcome the federal interest, as embodied in the comprehensive regulatory scheme governing timber operations on Indian territory, and the interest of the tribe itself, that is, "notions of sovereignty that have developed from historical traditions of tribal independence."[5] *Id.* at 145; *see also Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 836-38 (1982) (under *White Mountain*, federal regulation of financing and construction of educational facilities in Indian territory pre-empts imposition of gross receipts tax on non-Indian construction company); *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989) (under *White Mountain*, federal regulation of Indian mineral leasing does not pre-empt state severance taxes on oil and gas production by non-Indian lessee where Congress expressly waived exemption from such taxes and tribe not burdened by the tax regime).

In the instant case, New York seeks to require the collection, by federally licensed traders, of taxes purportedly due on cigarettes destined for sale to non-Indian consumers in Indian territory. Even assuming that a valid state interest underlies New York's precollection regime,[6] under the *Warren Trading Post* line of cases,

---

[5] Federal law and policy in this area are closely interwoven. As the *White Mountain* Court noted, "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain*, 448 U.S. at 144 (*citing McClanahan v. Arizona State Tax Comm'n, supra*, 411 U.S. at 174-75).

[6] *Amici* do not concede that New York has the right to impose tax on transactions occurring between Indian merchants and their customers on Mohawk territory. The treaties in force between the

New York's tax regulations nevertheless are pre-empted because they impinge on the interest of the federal government in regulating commerce with the Indians, and the interest of the Indian nations in maintaining independence from state regulation of transactions on Indian lands.

B. New York's Regulatory Scheme Violates Federal Law by Interfering with Commerce Between Indians and Federally Licensed Indian Traders.

1. *New York's Tax Scheme Comprehensively Regulates Sales by Indian Traders on Indian Territory.*

Section 471 of the New York Tax Law imposes a tax "on all cigarettes possessed in the state by any person for sale . . . , except that no tax shall be imposed under such circumstances that this state is without power to impose such tax." The tax is intended to be borne by the retail cigarette consumer. Tax Law § 471(2). Pursuant to this provision, the New York Department of Taxation and Finance promulgated a comprehensive set of regulations aimed at regulating the distribution, sale, and consumption of cigarettes in sovereign Indian territories for the sole purpose of collecting the state cigarette tax on the sale of cigarettes by Indian retailers to non-Indian or non-member Indian consumers.

The regulatory regime requires Indian (and non-Indian) retailers and Indian wholesalers who sell or intend to sell untaxed cigarettes in Indian territories to register with

United States and the Six Nations of the Iroquois Confederacy confirm that the Six Nations retain their aboriginal sovereignty over the territories reserved exclusively to them. *See, e.g.*, Treaty with the Six Nations art. III, 7 Stat. 15, 15-16 (1784). The Six Nations, including *amicus* Saint Regis Mohawk Tribe, were never subjugated by the United States and have never ceded any of their aboriginal sovereignty over tribal lands. This Court has not ruled on whether state action, including any sales or excise taxes, apply in these precise circumstances.

the Department of Taxation and Finance. *See* 20 NYCRR § 335.6(b)(4), (f)(2).[7] An Indian retailer may purchase untaxed cigarettes from a federally licensed Indian trader only if the State has issued a "certificate of registration." *See id.* § 335.6(f)(3). Registration is required because so-called "qualified sales" in Indian territories are made without the prepayment or precollection of tax. *See id.* § 335.6(b)(5). In order to effectuate a qualified sale in an Indian territory, the purchaser of cigarettes is required to give the seller proof of entitlement to purchase untaxed cigarettes. *Id.* §§ 335.6(d)(2) (purchases by an exempt Indian nation or tribe), (e)(2) (purchases by a qualified Indian consumer), and (f)(4) (purchases by a registered dealer).

Only agents who are licensed by the Department of Taxation and Finance to purchase and affix cigarette tax stamps are authorized to possess "untaxed" cigarettes to transport them onto Indian territory for subsequent "qualified sales." *See id.* § 335.7(b)(2). Each such agent licensed by New York who sells to Indian retailers or wholesalers on Indian territory also must be a federally licensed Indian trader. The amount of untaxed cigarettes which may be sold to Indian nations or tribes or sold to registered dealers for qualified re-sale will be determined by the State. *See id.* §§ 335.7(b)(3), (c), and (d).

If an Indian nation or tribe agrees with the Department of Taxation and Finance to regulate, license, or control the sale of untaxed cigarettes in the territory, then the wholesale agent must obtain approval from the nation or tribe, prior to each sale, of the agreed upon number of untaxed cigarettes he may deliver to the Indian territory. *Id.* § 335.7(c)(1). Otherwise, prior to each sale, the agent must ask the Department of Taxation and

[7] Section 335 of these regulations was renumbered as section 336, as of December 19, 1990, without substantive change. For the sake of clarity in citing the opinions below and other briefs, the prior numbers will be used.

Finance for approval of the amount of untaxed cigarettes he may deliver to the Indian territory. *Id.* § 335.7 (c)(2).[8]

Department of Taxation and Finance approval of the number of untaxed cigarettes that may be delivered will be based on evidence of valid purchase orders of quantities "reasonably related to the probable demand of qualified Indian consumers in the trade territory" of the Indian nation or tribe or of the registered dealer involved. *Id.* § 335.7(d)(1). Probable demand is determined by the Department of Taxation and Finance. In those cases where the Indian nation or tribe agrees to regulate the sale of untaxed cigarettes, or presumably otherwise collects data on the number of sales to qualified consumers, the Department of Taxation and Finance will "consult" with the nation or tribe regarding its evidence on probable demand. *Id.* § 335.7(d)(2)(i). In the absence of such regulation or evidence, the amount of untaxed cigarettes that may be delivered to an Indian territory will be equal to the average daily cigarette consumption in the State of New York, multiplied by the number of enrolled members of the nation or tribe. *Id.* § 335.7 (d)(2)(ii). The Department of Taxation and Finance also will "consider" evidence provided by registered dealers relating to probable demand. *See id.* § 335.7 (d)(4).

The Department of Taxation and Finance will consider the same sources of evidence to determine the trade territory of an Indian nation or tribe or of a registered dealer. *Id.* §§ 335.7(d)(3)(i), (d)(4). Otherwise, the Department of Taxation and Finance will determine the trade territory "based upon the information at its disposal." *Id.* § 335.7(d)(3)(ii).

---

[8] Whether an Indian nation or tribe participates in the regulatory regime or not, the Department of Taxation and Finance will determine the total amount of untaxed cigarettes that may be sold. *See* 20 NYCRR § 335.7(d).

It is evident from the foregoing that New York's regime for precollection of cigarette taxes would affect virtually every aspect of transactions occurring in Indian territory between federally licensed Indian traders and their Indian customers.

2. *New York's Tax Regime Conflicts with Federal Law and Usurps Tribal Self-Government.*

The regulations under scrutiny purport to control each basic component of cigarette sales by non-Indian wholesalers to their Indian customers in Indian territories—who is entitled to sell untaxed cigarettes, who is entitled to purchase such cigarettes, and the quantity of such cigarettes that may be sold. In addition, the regulations impose comprehensive and burdensome licensing and recordkeeping requirements on both wholesalers and Indian merchants. To say that these regulations interfere with Indian trade is an extreme understatement. They are in direct conflict with the federal Indian trader laws, burden dealings between Indians and Indian traders, and wrest from tribal governing bodies the authority to regulate transactions occurring in Indian territories.

New York's regulations are in direct conflict with section 261 of the Indian trader laws. In that statute, Congress granted the Commissioner of Indian Affairs "*sole* power and authority . . . to make . . . rules . . . specifying the kind and quantity of goods . . . which . . . shall be sold to the Indians." 25 U.S.C. § 261 (emphasis added). Yet the regulations in question purport to control commerce in untaxed cigarettes between federally licensed Indian traders and their Indian customers in Indian territories.

The New York regulations permit only those persons registered with the Department of Taxation and Finance to purchase and recell untaxed cigarettes in Indian territories. *See* 20 NYCRR § 335.6(b)(4). Accordingly, the right of a federally licensed Indian trader to sell untaxed

cigarettes to Indian purchasers is conditioned on registration with the State by the purchasers, who must provide proof of entitlement to purchase such cigarettes. *Id.* § 335.6(g). Further, the import of the regulations is that the Department of Taxation and Finance has the ultimate authority to determine the number of untaxed cigarettes that may be sold in Indian territories. If an Indian nation or tribe does not agree to regulate sales of untaxed cigarettes in its territory in accordance with the dictates of the Department, then the Department's authority over such sales will be unfettered. Absent regulation by the Indian nation or tribe, the Department will calculate both (1) the trade territory "based upon the information at its disposal," *id.* § 335.7(d)(3)(ii), and (2) probable demand "based upon the New York average consumption per capita, . . . multiplied by the number of enrolled members of the affected nation or tribe," *id.* § 335.7(d)(2)(ii). At most, the Department also will "consider" any evidence of probable demand submitted by registered dealers (such as Indian retailers), *id.* § 335.7(d)(4), and perhaps by the nation or tribe itself. In any event, absent regulation by the Indian nation or tribe, the Department will determine the total number of untaxed cigarettes permitted to be sold, and must approve beforehand each separate sale of untaxed cigarettes by a federally licensed Indian trader to an Indian retailer on Indian territory.

If an Indian nation or tribe agrees to regulate cigarette sales in its territory, it must negotiate with New York's Department of Taxation and Finance to determine the "agreed upon amount of [untaxed] cigarettes" that can be brought into the territory by federally licensed Indian traders. *See id.* § 335.7(c)(1). That number must be "reasonably related to . . . probable demand of qualified Indian consumers in the trade territory." *Id.* §§ 335.7(d)(1), (2)(i). The Department of Taxation and Finance will "consult" with the Indian nation or tribe regarding any evidence it may have relating to (1) probable demand, *id.* § 335.7(d)(2)(i), and (2) the "regulated and/or licensed sellers located on its reservation," *id.* § 335.7(d)(3)(i).

It is clear that the Department of Taxation and Finance alone will make the final determination of how many untaxed cigarettes may be brought into Indian territory by federally licensed Indian traders, even in cases where the Indian nation or tribe agrees to regulate cigarette sales in accordance with the Department's regulations. At most, the Department will "consult" with the Indian nation or tribe and then will determine probable demand within the trade territory. The Department will decide whether the number of untaxed cigarettes to be "agreed upon" between the nation or tribe and the Department in fact is reasonably related to that probable demand.

In short, the State of New York asserts the authority to control the very matters expressly reserved to the Commissioner of Indian Affairs in section 261 of the Indian trader laws. Thus, New York's precollection scheme, on its face, conflicts with federal statutes designed to govern commercial relations with the Indian nations. This should be sufficient to establish that the regulations are pre-empted by federal law. In addition, however, it is clear that New York's regulations will, in practice, both interfere with Indian commerce and offend the sovereignty of the Indian nations.

Under the regulations, each Indian nation or tribe, including *amicus* Saint Regis Mohawk Tribe, must obtain an "exempt organization certificate" from the Department of Taxation and Finance. *Id.* § 335.6(d)(ii). Each retailer and Indian wholesaler must obtain a "certificate of registration." *Id.* § 335.6(f). Each Indian consumer must "issue to the seller . . . a properly completed certificate of individual Indian exemption." *Id.* § 335.6(e)(2). Upon making "an initial purchase," the pur-

chaser must provide the supplier with a copy of the applicable certificate. *Id.* § 336.6(g)(1). Each subsequent delivery of untaxed cigarettes must be "substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser." *Id.* Such substantiation "must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. *Id.* § 335.6(g)(2). The seller must retain copies of the substantiation, *id.*, and "establish an acceptable system of associating [the] copies . . . with the applicable tax exemption certificates initially received from the purchasers." *Id.* § 335.6(g)(3).

These rules will require detailed documentation of every transaction between federally licensed Indian traders and their Indian customers on Indian territory and every transaction between Indian retailers and Indian consumers. The expense and paperwork burden imposed by this unwieldy system will be oppressive.[9]

Under New York's regulatory scheme, there is no assurance that Indian consumers will have access to sufficient quantities of untaxed cigarettes to satisfy their personal requirements. Indeed, it is virtually certain that Indian consumers will be forced to purchase taxed cigarettes. Moreover, there is no mechanism in the regulations for refunding state cigarette taxes illegally paid. *See* Tax Law § 476 (refund procedure for agents, dealers, and distributors, but not consumers).

[9] In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159-60 (1980), this Court upheld Washington State's requirement that Indian merchants retain records of Indian purchasers, their tribal affiliations, the Indian territory in which each sale took place, and the dollar amounts and dates of each sale. As the Court of Appeals concluded below, the requirements that New York State seeks to impose are more burdensome than those at issue in *Colville*. Moreover, in *Colville* this Court upheld Washington State's recordkeeping requirements solely because the Indian tribes involved failed to show that the requirements were not reasonably necessary. The lower court had imposed that burden of proof on Washington State. *See id.*

In determining the number of untaxed cigarettes to be allowed, the regulations rely in large part on the daily average consumption of cigarettes throughout New York State. *See* 20 NYCRR § 335.7(d)(2)(ii). The underlying premise is that daily average consumption of cigarettes in Indian territories is the same. The disparity in smoking rates between Indians and the public-at-large, however, has been reported in medical literature. *See, e.g., Cigarette Smoking Among American Indians, Alaskan Natives—Behavioral Risk Factor Surveillance System, 1987-1991*, 286 J. of Am. Med. Ass'n. 3052 (Dec. 2, 1992). If "probable demand" is limited to the overall New York average rate times the number of Indians in a given "trade territory," the number of untaxed cigarettes available almost certainly will not meet actual demand by Indian consumers. The regulations purport to account for any such differences by directing the Department of Taxation and Finance to "consider" information submitted by a given Indian nation or tribe or by a given Indian retailer. *See* 20 NYCRR § 335.7(d)(1), (d)(2)(i). There is no requirement, however, that the Department accept any such information. The Department has final authority to determine "probable demand" using the New York State average consumption rate, in addition to determining the "trade territory" and even the number of Indian consumers within that territory.[10]

[10] This problem is particularly significant to *amicus* Saint Regis Mohawk Tribe. The Tribe's territory straddles the border between the United States and Canada. Members of the Tribe reside on both sides of the border and travel freely between the two portions of the Tribe's lands. Specifically, thousands of members of the Tribe live in the Canadian portion of the territory. There is sig-

Finally, the regulations as applied would effectively usurp tribal authority over transactions occurring in Indian territories. As previouly noted, if the regulations are given effect, New York State alone will control the flow of untaxed cigarettes into Indian territories. At most, the Department of Taxation and Finance will "consult" with the Indian nation or tribe and then will determine probable demand within the trade territory. The Department will decide whether the number of untaxed cigarettes to be "agreed upon" between the nation or tribe and the Department in fact is reasonably related to that probable demand.

In these circumstances, the exercise of the Indian nation's or tribe's authority to approve each sale of untaxed cigarettes within its own territory will be reduced to informing each federally licensed Indian trader of its share of the "agreed upon" total number allowed by the Department. It is this aspect of New York's regulations that is most offensive to tribal sovereignty. If the Saint Regis Mohawk Tribe, or any other nation or tribe bordering New York State, chooses not to regulate cigarette sales on its own land pursuant to the State's regulations, then the Department of Taxation and Finance will dictate the number of untaxed cigarettes that can be purchased from federally licensed Indian traders, and will have veto power over each and every sale of untaxed cigarettes to Indian merchants on Indian land. If the tribe submits and agrees to regulate the distribution of untaxed cigarettes according to the State's rules, then the Tribe's role will be advisory at most. The Tribe's regulation of cigarette sales will require the imprimatur of the Department of Taxation and Finance in determining the number

nificant trade, including commerce in cigarettes, between the two portions of the Tribe's territory. There is no assurance, however, that New York's Department of Taxation and Finance will take into account the number of Saint Regis Mohawks who reside on the Canadian side in determining the number of untaxed cigarettes to be made available in the southern part of the Tribe's territory.

of untaxed cigarettes available and in reviewing each individual sale.

Moreover, the State's requirement that Indian nations or tribes and Indian retailers obtain "certificates" of tax exemption will vest the Department of Taxation and Finance with another layer of substantive control over commerce in cigarettes on Indian territory. Certification is another procedure in which Indians will be required to seek New York's imprimatur in order to be allowed to purchase untaxed cigarettes from federally licensed Indian traders and sell them to Indian consumers. That element of New York's tax scheme violates Indian tribal sovereignty and power to regulate commerce on Indian land.

Thus, the regulations vest New York with substantive control over commerce in cigarettes occurring on Indian territory. This complete usurpation of tribal authority offends those "notions of sovereignty . . . developed from historical traditions of tribal independence," that underlie any determination of whether state action is pre-empted by federal law. *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 145.

In summary, New York's regulatory regime, by purporting to regulate the most fundamental aspects of sales by federally licensed Indian traders to Indian customers in Indian territories, on its face conflicts with section 261 of the Indian trader laws, which by its terms governs these same aspects of cigarette sales by Indian traders. Moreover, there can be no doubt that the New York precollection regime would, in practice, impose significant additional burdens on the relationship between federally licensed Indian traders and their Indian customers, in derogation of tribal self-government. This Court should hold that, under *Warren Trading Post* and its progeny, New York's regulatory scheme is pre-empted by federal law.

II. THIS COURT'S DECISIONS IN *MOE, COLVILLE,* AND *POTAWATOMI* ARE INAPPOSITE.

The pre-emptive force of the Indian trader laws in cases involving state taxation of sales by federally licensed Indian traders who sell to Indian customers in their own territory is not altered by this Court's holdings in cases involving collection of state sales taxes by Indian merchants who make retail sales to non-Indian purchasers in Indian territory. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"); *Moe v. Confederated Salish & Kootenai Tribes, supra*, 425 U.S. 463 (1976) ("*Moe*"). Neither *Moe* nor *Colville* addressed the issue of whether federal law pre-empts a precollection regime imposed on sales between federally licensed Indian traders and their Indian customers on Indian territory.

Moe involved application of Montana's direct tax on retail consumers of cigarettes, which retailers were required to collect. 425 U.S. at 482. The Court held that "[t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden" that neither "frustrates tribal self-government" nor "runs afoul of any congressional enactment dealing with the affairs of reservation Indians." 425 U.S. at 483. In *Moe*, the Court noted that *Warren Trading Post* "does not apply," distinguishing the cases on their facts. 425 U.S. at 482.

Colville involved Washington State's tax on "the sale, use, consumption, handling, possession or distribution" of cigarettes, the legal incidence of which was on "the purchaser in transactions between an Indian seller and a non-Indian buyer." 447 U.S. at 141-42. The Court relied on *Moe* to conclude that "the State may validly require the tribal smokeshops to affix stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe." 447 U.S. at 159. In *Colville*, the Indian merchants involved

were licensed federal Indian traders, as were their non-Indian wholesale suppliers. 447 U.S. at 144. However, the Court carefully pinpointed the distinction between Indian retailers selling to non-Indians versus federally licensed Indian traders selling to Indians:

> The Indian trader statutes, 25 U.S.C. § 261 *et seq.* incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, *see Warren Trading Post Company v. Arizona Tax Comm'n*, 380 U.S. 686 (1965), but no similar intent is evident with respect to sales made by Indians to non-members of the Tribe.

447 U.S. at 155-56. The status of the Indian retailers as federally licensed Indian traders was irrelevant, therefore, to the holding in *Colville*. That issue was not mentioned at all in *Moe*.

The transactions at issue in *Moe* and *Colville* were retail sales by Indian-owned enterprises to non-Indians (or to non-member Indians). The taxes at issue in those cases were sales/use taxes that were imposed directly on retail transactions, to be paid by the non-Indian customers and collected by the Indian retailers. *Moe* and *Colville* hinge on "tribal sovereignty," deference to which does not oust the "minimal burden" of a state's requirement that Indian merchants collect tax on sales to non-Indian customers. *Warren Trading Post*, by contrast, rests on the pre-emptive effect of the federal Indian trader laws. Respondents are correct in stating that petitioners' reliance on *Moe* and *Colville* to weaken, narrow, or limit the pre-emptive effect of the federal Indian trader laws, as explained in *Warren Trading Post* and its progeny, is misplaced.[11]

---

[11] As noted, the holdings in *Moe* and *Colville* make no mention of the federal Indian trader laws. Despite the clear statements in *Moe* and *Colville* distinguishing each case from *Warren Trading Post*, the two lines of cases can be confused. Non-Indian wholesalers who are licensed Indian traders, such as respondents in this

Finally, petitioners' reliance on certain *dictum* in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), is similarly misplaced. In that case, the Court held that tribal sovereign immunity bars states from attempting to collect from Indian nations or tribes state taxes payable on retail sales to non-Indians in Indian territory. The Court ventured, however, that "[s]tates may of course collect the sales tax from cigarette wholesalers . . . by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514. It should be noted that neither *Potawatomi*, nor the only authority cited for this proposition, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990), even mentions the federal Indian trader laws. Accordingly, *Potawatomi* is not authority on the question of whether federal law pre-empts New York's tax regulations.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the New York State Court of Appeals.

Respectfully submitted,

BRADLEY S. WATERMAN
(Counsel of Record)
SAMUEL M. MARUCA
G. FRANK RILEY III
Of Counsel
ZAPRUDER & ODELL
601 13th Street, N.W., Suite 800S
Washington, D.C. 20005
(202) 508-9600
Counsel for Amici Curiae
Saint Regis Mohawk Tribe
Mohawk Tax Steering Committee

January 18, 1994

---

case, come under *Warren Trading Post*. This Court should decline petitioners' invitation to blur these two separate lines of cases.